115-411

TRANSCRIPT OF RECORD. 532

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~305~~. 44

THOMAS DREW AND EDMUND WEBB, PLAINTIFFS IN ERROR,

vs.

IRVING GRINNELL AND GEORGE S. BOWDOIN, AS EXECUTORS OF MOSES H. GRINNELL, DECEASED, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 5, 1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 305.

THOMAS DREW AND EDMUND WEBB, PLAINTIFFS IN ERROR,

vs.

IRVING GRINNELL AND GEORGE S. BOWDOIN, AS EXECUTORS OF MOSES H. GRINNELL, DECEASED, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Thomas Drew and Edmund Webb, plaintiffs, and Irving Grinnell and George S. Bowdoin, as executors of Moses H. Grinnell, deceased, defendants, a manifest error hath happened, to the great damage of the said plaintiffs, as is said, and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 2d day of November, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and sixth.

[SEAL.] JOSEPH M. DEUEL,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
Nov. 2d, 1881. SAM'L BLATCHFORD, *C. J.*

2 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Joseph M. Deuel, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to thirty-seven, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Thomas Drew and Edmund Webb, plaintiffs in error, against Irving Grinnell and George S. Bowdoin, as executors of Moses H. Grinnell, deceased, defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this seventh day of August, in

the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh.

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

[Endorsed:] 898. U. S. Supreme Court. Thomas Drew *et al.*, pl'ffs in error, *vs.* Irving Grinnell & George S. Bowdoin, executors, &c., def'ts in error. Original writ of error. Stanley & Clarke, att'ys for pl'ffs in error, 158 B'way. Due service of a copy of the within is hereby admitted. Dated N. Y., Nov. 3, 1881. S. L. Woodford, attorney for defendants in error. U. S. circuit court. Filed Nov. 3, 1881. Joseph M. Deuel, clerk.

3 *Summons for Relief.* (*Com. not Ser.*)

New York Superior Court.

THOMAS DREW and EDMUND WEBB, Plaintiffs,
against
MOSES H. GRINNELL, Collector of the Port of New York, Defendant. } No. 2.

To the above-named defendant:

You are hereby summoned and required to answer the complaint in this action which will be filed in the office of the clerk of the superior court of the city of New York, and to serve a copy of your answer to the said complaint on the subscribers at their office, No. 19 Broad street, in said city, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiffs in this action will apply to the court for the relief demanded in the complaint.

MITCHELL & SEYMOUR,
Plaintiffs' Attorneys, 19 Broad St., N. Y. City.

Dated Sept. 11th, 1869.

4 Endorsed: 898 N. S. N. Y. superior court. Thomas Drew *et al.*, pl'ffs, *vs.* Moses H. Grinnell, collector of the port of New York, def't No. 2. Summons. Mitchell & Seymour, pl'ffs' att'ys, 19 Broad St., N. Y. city. (Custom-house, New York. Received Sept. 13, 1869.) (Received Sep. 14, 1869. U. S. attorney's office.)

5 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Moses H. Grinnell, defendant, by Thomas Drew & *al.*, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 6th day of June, 1870, as fully and amply as the same are remaining before you, by what-

ever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Salmon P. Chase, Esquire, Chief Justice of the Supreme Court of the United States, the 31st day of May, in the year one thousand eight hundred and seventy.

KENNETH G. WHITE, *Clerk.*

EDWARDS PIERREPONT,
Defendant's Attorney.

6 [Endorsed:] 898. U. S. circuit court. Moses H. Grinnell *ads.* Thomas Drew & *al.* Copy certiorari. Edwards Pierrepont, defendant's attorney. Sir: Take notice that the within is a copy of a certiorari, this day issued out of the circuit court of the United States for the southern district of New York. New York, May 31, 1870. Yours, &c., Edwards Pierrepont, defendant's attorney. Due service of a copy of the within and of the above notice is hereby admitted. New York, June 2d, 1870. Mitchell & Seymour, plaintiffs' attorneys.

7 *Declaration.*

U. S. Circuit Court, Southern District of New York, in the Second Circuit.

THOMAS DREW *et al.*
ag'st
MOSES H. GRINNELL, Collector, &c. } Suit com. Sept. 15th, 1869.

This 18th day of November, in the year of our Lord one thousand eight hundred and seventy-three—

The above-named plaintiffs come here into court, by Mitchell & Seymour, their attorneys, and by their said attorneys complain of the defendant in this suit in a plea of trespass on the case for promises, for that the said defendant, on the day of the date of this declaration, being indebted to the plaintiffs in the sum of seventeen dollars and fifty cents for duties on certain merchandize, to wit, spot nets, manufactures of silk and cotton, imported into and entered at the collection district of the United States for the city of New York, on or about the 10th day of May, 1867, in the
8 ship or vessel "City of London," from Nottingham, unlawfully demanded, exacted, and received at the city of New York aforesaid by the defendant, then the collector of the customs for the district aforesaid, under color of the law of the United States for the collection of duties on imports, and paid by the plaintiffs under protest, in writing, in due form of law, and at or before the date of this declaration had and received to the use of the defendant, and who, in consideration thereof, promised to pay the same amount to plaintiffs on demand. Yet the said defendant has not paid the same nor any part thereof, though thereto often requested, to the damage of the said plaintiffs in the sum of forty dollars, and therefore said plaintiffs bring this suit.

MITCHELL & SEYMOUR,
Pl'ffs' Att'ys, 19 Broad St., N. Y. City.

9 Please take notice that the original of which the within declaration is a true copy has this day been filed in the office of the clerk of the circuit court for the southern district of New York.

Dated N. Y., Nov. 19th, 1873.

MITCHELL & SEYMOUR,
Pl'ffs' Att'ys.

To GEO. BLISS, Esq., *Def'ts Att'y.*

[Endorsed:] 898. U. S. circuit court, southern district of New York. Thomas Drew *et al.* ag'st Moses H. Grinnell, collector, &c. Declaration. Mitchell & Seymour, pl'ffs' att'ys, 19 Broad St., N. Y. city. Received Nov. 19, 1873. U. S. attorney's office.

10 SCHEDULE.—*Importers, Thomas Drew & Co.*

No., 1.
Description of merchandise, spot nets.
Place from which imported, Nottingham.
Name of vessel, City of London.
Date of invoice, April 24, 1869.
Date of entry, May 10, 1869.
Dutiable value, $175.00.
Date of liquidation of demand and payment of excessive duty, June 10, 1869.
Am't of duty paid in excess, $17.50.
Date of filing notice of protest, June 11, 1869.
Date of filing letter of appeal, June 12, 1869.
Date of decision of Sect. of Treasury, June 15, 1869.

Endorsed: N. Y. superior court. Thomas Drew & Edmund Webb ag'st Moses H. Grinnell, collector, &c. No. 2. 898. SIR: Please to take notice that the following is the bill of particulars of items of the plaintiffs' demand in the above-entitled action, to wit, monies exacted by compulsion & duress & under color of the revenue laws of the United States by the defendant, as collector as aforesaid, from and paid by the plaintiffs on merchandise imported by the plaintiffs, as per schedule hereto annexed, with legal interest on said amount from the date of payment thereof as aforesaid. Yours, &c., Mitchell & Seymour, pl'ffs' att'y-, 19 Broad St., N. Y. city. Dated October 22d, 1869. To Edwards Pierrepont, Esq., def't's att'y. Received Oct. 22, 1869, U. S. attorney's office.

11 *Plea.*

United States Circuit Court, Southern District of New York.

MOSES H. GRINNELL *ads.* THOMAS DREW *et al.*

And the said defendant, Moses H. Grinnell, by George Bliss, his attorney, comes and defends the wrong and injury when, etc., and says that he did not undertake and promise, in manner and form as the said plaintiffs in this suit have above thereof declared, against

the said defendant, and of this he puts himself upon the country; And the said plaintiffs do the like, etc.

GEO. BLISS,
Defendants' Attorney.

To MITCHELL & SEYMOUR, Esq.,
Plaintiff's Attorney.

12 [Endorsed:] 898. U. S. circuit court. Moses H. Grinnell *ads.* Thomas Drew *et al.* Plea. Geo. Bliss, attorney for defendant. Due service of a copy of the within is hereby admitted. New York, Nov. 24, 1873. Mitchell & Seymour, pl'ff's att'ys: You will please take notice that the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York. New York, Nov. 22, 1873. Yours, etc., Geo. Bliss, defendants' attorney. To Mitchell & Seymour, Esq., plaintiff's attorney.

13 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Thursday, the 7th day of April, in the year of our Lord one thousand eight hundred and eighty-one.

Present: The Honorable Wm. J. Wallace, judge.

THOMAS DREW *et al.*
vs.
MOSES H. GRINNELL. } 898.

This case being still on trial, the jurors sworn in it are called, and severally answer to their names.

Mr. Stanley suggests to the court the death of the said defendant, Moses H. Grinnell.

On motion of Mr. Stanley, ordered that this action be, and the same is, continued against Irving Grinnell and George S. Bowdoin, executors of the last will and testament of said Moses H. Grinnell, deceased.

Mr. Herrick moves that the court direct the jury to find a verdict for the defendant.

The court denies said motion, and Mr. Herrick excepts to the ruling of the court in so doing.

14 Mr. Stanley moves that the court direct the jury to find a verdict for the plaintiff- for the full amount claimed.

The court denies said motion, and Mr. Stanley excepts to the ruling of the court in so doing.

Mr. Herrick sums up the case on the part of the defendant.

Mr. Stanley sums up the case on the part of the plaintiff-.

Charge is thereupon given by the court to the jury, who retire in charge of an officer duly qualified to attend them, and on their return say that they find a verdict for the defendant; and so say they all.

On motion of Mr. Stanley, ordered that the plaintiffs have a stay of proceedings for thirty days within which to prepare and serve a bill of exception herein.

15 *Judgment.*

United States Circuit Court, Southern District of New York.

THOMAS DREW & ano'r
vs.
IRVING GRINNELL & GEORGE S. BOWDOIN, Executors. } N. S. 898.

The issues in this action having been brought on for trial before Mr. Judge Wallace and a jury at a circuit court of the April term, 1881, and the issues having been tried, and a verdict for the defendant having been duly rendered on the seventh day of April, 1881, and his costs having been adjusted at $56.41:

Now, on motion of Stewart L. Woodford, United States attorney, for defendant—

It is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $56.41, his taxed costs, and have execution therefor.

Judgment signed this 6th day of Sept., 1881.

J. M. DEUEL, *Clerk.*

16 Endorsed: N. S. 898. United States circuit court. Thomas Drew & ano. *vs.* Irving Grinnell & George S. Bowdoin, executors, &c. Judgment roll. Stewart L. Woodford, United States attorney, for defendant. Filed —— —, 187–, 12 m. Costs, $56.41. U. S. circuit court. Filed Sep. 6, 1881. Joseph M. Deuel, clerk.

17 *Bill of Exceptions.*

U. S. Circuit Court.

THOMAS DREW *et al.*
against
IRVING GRINNELL and GEORGE S. BODINE, Executors of Moses H. Grinnell, Deceased.

This cause coming on to be heard before his honor Justice Wallace and a jury on Apr. 6 & 7, 1881, plaintiffs, to sustain the issues on their part, proved that they imported certain merchandise from Liverpool in May, 1869, which was invoiced and entered at the custom-house as "white cotton and silk spot net;" that the collector, Moses H. Grinnell, exacted a duty thereon of sixty per cent. ad valorem as "silk laces." The defendants are his executors. The defendants duly protested, in writing, against such exaction, claiming that said goods were subject only to a duty of fifty per cent.
18 ad valorem, as manufactures of which silk is the component material of chief value, not otherwise provided for, under the 8th section of the act of June 30, 1864, and plaintiffs duly appealed to the Secretary of the Treasury from the decision of the collector, and brought this suit within ninety days after the decision of the Secretary on said appeal.

Plaintiffs produced witnesses, who testified that the merchandise in question was a manufacture made partly of silk and partly of cotton.

That the ground of the fabric was silk and the spot upon it was cotton, but the fabric was made substantially of silk, and that the article was universally bought and sold under the name of spot or dotted net, and never by the name of silk lace; that there was, in 1864, and has been ever since that time, a well-known class
19 of goods imported into this country, which was made wholly of silk, and other and different from the merchandise in question in this action, which was bought and sold under the name of "silk lace."

Plaintiff offered testimony tending to show that the fabrics commercially regarded as silk laces were finished on one side in figures in the form of a scollop as a rule, and having finished edges, and that lace edgings were known as silk laces; that among laces known as silk laces are Spanish laces, Pushee laces, blond laces; that all laces which are known in commerce as silk laces are made on a machine; that there were minor classes of laces included in the general class of silk laces.

And each class is composed of several kinds of laces which go by distinguishing names, so that if a person should come into a
20 store and ask for silk laces it would not be possible to tell what particular silk lace he wanted until he should specify by its particular name the particular variety wanted.

That there were different names for different kinds of nets, and if a person should simply ask for net goods it could not be ascertained what particular article he required until he mentioned its specific distinguishing name.

That there were curtain nets, bobbinets, Brussels nets, Mechlin nets, zephyr nets, mohair nets, illusion nets, and a variety of others. But plaintiff's witnesses, upon cross-examination, testified that the term silk laces was not a commercial term used to designate a particular article in trade, but was a general term, and that such particular silk lace had a specific trade name, such as Valenciennes, Bretonne, and a variety of other names.

21 Plaintiffs' counsel having rested his case, the defendants' counsel called witnesses who testified in behalf of the defendant that they were and had been for twenty years wholesale dealers in and importers of silk laces, and were also wholesale dealers and importers of goods like the goods which were the subject of controversy in this action; that the term silk laces was not generally regarded in trade and commerce in the United States among wholesale dealers in and importers of laces as a commercial term used to designate any particular article of trade, but was generally understood to include all laces which were made wholly or substantially of silk, and that each particular lace had a particular trade name, and that the goods which were the subject of controversy in this suit were a particular kind of silk lace called spotted
22 or dotted net.

That they were made upon lace machines, and that in trade and commerce generally in the United States laces were understood to be delicate, thin ornamental net work, the meshes of which were formed by plaiting together threads of silk, cotton, or other mate-

rial, and that the goods which were the subject of controversy in this suit corresponded with that definition.

Both parties having rested, plaintiffs' counsel requested the court to direct a verdict for plaintiff. The court refused to make such direction, and plaintiffs' counsel duly excepted.

The court then charged the jury, and among other things instructed them that if the plaintiffs' importation was not a silk lace within the meaning of the act of June 30, 1864, the plaintiff was entitled to recover.

23 That it was a silk lace within the meaning of the act, if it was a lace of which silk was the compound material of chief value, unless at the time the act was passed it was commercially known by importers and dealers in such articles in this country as a different article.

That if it was commercially known as "spot net" or "dotted net" instead of lace, it would fall under the clause relating to manufactures of silk net, otherwise provided for; but if it was called by such name only to distinguish it from other varieties of silk lace, all silk laces being known by some particular name which distinguished one variety from the others, it was nevertheless a silk lace within the meaning of the act.

The cause having been summed up, plaintiffs' counsel re-

24 quested the court to charge the jury—

1st. That if the jury find that goods such as those in question were not generally known among wholesale dealers in, and importers of, the articles in buying and selling, at and prior to June 30, 1864, in our markets, under the commercial name of "silk lace," then the plaintiffs are entitled to recover. The court refused so to charge, and plaintiff's counsel duly excepted.

2nd. That if the jury find that goods such as those in question generally known among wholesale dealers in, and importers of, the the article, in buying and selling, at and prior to June 30, 1864, in our markets under the name of "nets" or "spot nets," or "dotted nets," or "silk and cotton spot nets," and not as "silk laces," then the plaintiffs are entitled to a verdict.

The court refused so to charge, and plaintiffs' counsel duly excepted.

25 3rd. That testimony having been given and not contradicted, that the goods in suit were manufactures of silk and cotton, in which silk was the component material of chief value, the plaintiffs are entitled to recover, unless the goods were known in trade and commerce in this country by importers as silk laces.

The court refused so to charge, and plaintiff's counsel duly excepted.

4th. That if the jury find that the goods were not commercially known among wholesale dealers in this country as silk laces, at the time of the passage of the act of June 30, 1864, plaintiffs are entitled to recover.

The court refused so to charge, and plaintiffs' counsel duly excepted.

5th. That it is immaterial whether goods like plaintiff's impor-

tations were or were not known as laces—if they were not
26 known commercially as silk laces. The court refused so to charge, and plaintiffs' counsel duly excepted.

6th. That plaintiff having shown without contradiction that the articles in controversy were composed of silk and cotton, the presumption in the absence of proof would be that the laces were not silk laces.

The court refused so to charge, and plaintiffs' counsel duly excepted.

The jury having retired, came into court for further instructions, and the court charged the jury that the first clause of the 8th section imposes a duty of 60 per cent. upon articles which were made all of silk, or which were made of silk and cotton, in which silk was the controlling element, if they were known among merchants as silk goods.

To this charge the plaintiffs' counsel duly excepted.

27 The jury then returned and found a verdict for defendant.

And inasmuch as the matters aforesaid do not appear upon the record or otherwise than by this bill of exceptions, plaintiffs' counsel has caused the same to be made, and it was duly signed and settled this 19th day of July, 1881.

WM. J. WALLACE,
District Judge.

Endorsed: 898. U. S. circuit court. Thomas Drew *et al.*, plaintiff, against Irving Grinnell *et al.*, defendant. Bill of exceptions.
28 Stanley, Brown & Clarke, attorneys for plaintiffs, 158 Broadway, New York. U. S. circuit court. Filed Aug. 25, 1881. Joseph M. Deuel, clerk.

29 *Assignment of Errors.*

Supreme Court of the United States.

THOMAS DREW, Plaintiff in Error,
against
IRVING GRINNELL and GEORGE S. BODINE, Executors of Moses H. Grinnell, deceased, Defendants in Error.

Afterwards, to wit, on the second Monday of October, 1882, before the justices of the said court, at the Capitol, in Washington, comes the said plaintiff in error, by Stanley & Clarke, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiff in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff against the said defendant.

30 And the said plaintiff prays that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held

for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c., &c., &c.

STANLEY & CLARKE,
Attorneys for Plaintiffs in Error.

Endorsed; U. S. Supreme Court. 898. Thomas Drew, pl'ff in error, against Irving Grinnell and George S. Bodine, exsc. of Moses H. Grinnell, dec'd, def'ts in error. Assignment of error. Stanley & Clarke, att'ys for pl'ff in error, 158 Broadway, N. Y. city.

31 Due service of a copy of the within is hereby admitted. Dated N. Y. Nov. 14, 1881. S. L. Woodford, U. S. attorney, att'y for def't in error. U. S. circuit court. Filed Nov. 14, 1881. Joseph M. Deuel, clerk.

32 *Joinder in Error.*

United States Supreme Court.

THOMAS DREW & ano., Plaintiffs in error,
against
IRVING GRINNELL & CHARLES S. BOWDOIN, Executors, &c., of Moses H. Grinnell, Deceased, Defendants in Error.

And afterwards, to wit, on the second Monday of October, 1882, the said defendants in error, by Stewart L. Woodford, their attorney, come here into court, and say that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And they pray that the said Supreme Court, before the justices thereof, now here, may proceed to examine, as well the records and proceedings aforesaid, as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, &c.

S. L. WOODFORD,
Attorney for Defendants in Error.

33 Endorsed: 898. U. S. Supreme Court. Thomas Drew & ano., plaintiffs in error, *versus* Irving Grinnell & Charles S. Bowdine, executors, &c., defendants in error. Joinder in error. Stewart L. Woodford, United States attorney, attorney for defendants in error. Due service of a copy of the within is hereby admitted. New York, Nov. 16th, 1881. Stanley & Clarke, attorneys for plaintiffs in error. To Stanley & Clarke, attorneys for plaintiffs in error. U. S. circuit court. Filed Nov. 16, 1881. Joseph M. Deuel, clerk.

34 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

THOMAS DREW & EDMUND WEBB
vs.
IRVING GRINNELL & GEORGE S. BOWDOIN, as Executors of Moses H. Grinnell, Deceased.

Know all men by these presents that we, Charles Curie, of the

city of New York, and John A. Bagley, of No. 45 East 28th street, in said city of New York, are held and firmly bound unto the above-named Irving Grinnell and George S. Bowdoin, as executors of Moses H. Grinnell, deceased, in the sum of two hundred and fifty dollars, to be paid to the said executors; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 26th day of October, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas the above-named Thomas Drew & Edmund Webb have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Thomas Drew & Edmund Webb shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make said writ good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CHAS. CURIE. [L. S.]
JOHN A. BAGLEY. [L. S.]

Sealed and delivered and taken and acknowledged, this 31st day of October, 1881, before me—

[L. S.] WILLIAM G. DAVIS,
Notary Public, New York County.

35 UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

Charles Curie and John A. Bagley, severally being duly sworn, do depose and say, each for himself: That he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

CHAS. CURIE.
JOHN A. BAGLEY.

Sworn to, this 31st day of October, A. D. 1881, before me—
WILLIAM G. DAVIS,
Notary Public, New York County.

[Endorsed:] U. S. circuit court. Thomas Drew *et al. vs.* Irving Grinnell, George S. Bowdoin, executors, &c. Bond for damages and costs on Stanley & Clarke, att'ys for pl'ffs, 158 Broadway, N. Y. Approved Nov. 2, 1881. Sam'l Blatchford, C. J. U. S. circuit court. Filed Nov. 2, 1881. Joseph M. Deuel, clerk.

36 UNITED STATES OF AMERICA, *ss:*

To Irving Grinnell and George S. Bowdoin, as executors of Moses H. Grinnell, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on

the second Monday of October, eighteen hundred and eighty-two, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Thomas Drew and Edmund Webb are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated New York, November 2d, 1881.

SAM'L BLATCHFORD, *C. J.*

[Endorsed:] U. S. Supreme Court. 898. Thomas Drew *et al.*, plaintiffs in error, against Irving Grinnell & George S. Bowdoin, executors, &c., defendants in error. Original citation. Stanley & Clarke, att'ys for pl'ffs in error, 158 B'way, N. Y. city. U. S. circuit court. Filed Nov. 3, 1881. Joseph M. Deuel, clerk. Due service of a copy of the within is hereby admitted. Dated N. Y., Nov. 3, 1881. S. L. Woodford, attorney for defendants in error.

Endorsed on cover: S. New York, C. C. U. S. No. 305. Thomas Drew and Edmund Webb, plaintiffs in error, *vs.* Irving Grinnell and George S. Bowdoin, as executors of Moses H. Grinnell, deceased, late collector of the port of New York. Filed 5th October, 1882.

Office Supreme Court U. S.
FILED.
NOV 13 1885
JAMES H. MCKENNEY.
CLERK.

115-477

Burgoyne's "Quick" Print, 146 Nassau St., N.Y.

44

Supreme Court of the United States,

OCTOBER TERM, 1885.

THOMAS DREW and EDMUND WEBB,
Plaintiffs in Error

AGAINST

IRVING GRINNELL and GEORGE S. BOWDOIN as Executors of Moses H. Grinnell, deceased, late Collector &c.,
Defendants in Error.

Brief for Plaintiffs in Error.
No. 44.

STATEMENT.

This is a writ of error to the Circuit Court for the Southern District of New York.

In 1869 plaintiffs imported from England certain merchandise which was invoiced at the place of manufacture, as "white cotton and silk spot net," and entered under the same name, at the port of New York. (p. 6.) The Collector exacted a duty of sixty per cent. *ad valorem* upon the importation as "silk lace," under the eighth section of the Act of June 30, 1864, (*ib.*) The plaintiffs duly protested against the exaction and duly appealed therefrom and brought this suit in due time to recover back ten per cent. of the amount exacted, (*ib.*) The plaintiffs claimed that only fifty per

cent. duty should be charged on the goods because they were manufactures of which silk was the component material of chief value and because they were not "otherwise provided for," under the same section of said act. It is not contended that the importations were "*otherwise provided for*" unless they were either *in fact*, or *commercially*, "silk lace."

It was proven that the importation was in fact made partly of silk and partly of cotton, but substantially of silk, the ground of the fabric being of silk and the spots upon it of cotton. (Bottom of p. 6 and top of p. 7.) There was more in bulk and weight in the silk ground than in the ornamental cotton work on it. The value of the labor on the ornamentation in making the spots was however much greater in amount than that expended in making the mesh, as an inspection of the article in evidence shows. The article was *universally bought and sold* under the name of "spot or dotted net" (Top of p. 7). *This was not denied by any witness.* The article was therefore proven to have been known commercially *i. e., by all buyers and sellers* as "spot or dotted net."

Plaintiff then proved that at the date of the Act of June 30, 1864 and ever since that time there was a well known class of goods imported into this country which was made wholly of silk, and other and different from plaintiffs' goods, and that such goods were known commercially as silk lace (*Ib.*)

Plaintiffs' and defendants' witnesses testified that the term silk lace was not *generally regarded* as a commercial term which was used to designate any *particular article* of trade. (Middle of p. 7). (This was true but immaterial.) The term silk lace did *not* serve to designate any *specific* article, but a class of specific articles. Defendants' witnesses testified that the term silk lace was *generally* understood to include all laces which were made wholly or substantially of silk. (Middle of p. 7). (This was not true; black thread lace is made of silk but it is always known as thread lace,

and never as silk lace. *Lahey vs. Arthur 96 U. S.*, pp. 114, 115. The distinction between thread laces and silk laces has been recognized by Congress and runs through its Statutes for more than thirty years. (*Ib.*, p. 112.) Defendants' witnesses testified that each particular lace had a particular trade name. This was true); and further testified that the goods in controversy in this suit were a particular kind of silk lace called spotted or dotted net. This was evidently not true *in fact*, because it was proved and not denied that the body only was made of silk, while the ornamental spot was made of cotton.

It was not true that it was silk lace *commercially* because plaintiffs' witnesses swore positively that it was never bought or sold as silk lace (top of p. 7) and defendants' witnesses testified that silk lace was not a commercial term. (p. 7, fol. 21.)

Defendants' witnesses then testified that nets were made upon lace machines, (This was not true), and further testified that lace was a thin ornamental net work, &c. The Court charged that if the plaintiffs' importation was not a silk lace within the meaning of the Act of June 30, 1864 the plaintiffs were entitled to recover, that it was a silk lace within the Act if it was a lace of which silk was a component material of chief value unless it was commercially known by importers and dealers as a different article. (This was error.) The Court charged that if plaintiffs' goods were commercially known as "spot net" or "dotted net" instead of "lace" they would fall under the clause relating to manufactures of silk not otherwise provided for, &c. (This was correct.)

Assignment of Errors.

The plaintiffs' counsel assigns for error:—

1st. The refusal of the Court to direct a verdict for plaintiffs (Top of p. 8.)

2nd. The refusal of the Court to charge that if the jury found that goods such as those in question were not generally known among wholesale dealers in, and importers of, the article, in buying and selling, at and prior to June 30th., 1864, in our markets under the commercial name of "silk lace" that the plaintiffs were entitled to recover.

3d. The refusal of the Court to charge that if the jury found that goods such as those in question were generally known among wholesale dealers in, and importers of, the article, in buying and selling, at and prior to June 30th., 1864, in our markets, under the name of "nets" or "spot nets," or "dotted nets," or "silk and cotton spot nets," and not as "silk laces," then the plaintiffs are entitled to a verdict.

4th. The refusal of the Court to charge that testimony having been given and not contradicted, that the goods in suit were manufactures of silk and cotton, in which silk was the component material of chief value, the plaintiffs were entitled to recover unless the goods were known in trade and commerce in this country by importers as "silk lace."

5th. The refusal of the Court to charge that if the jury find that the goods were not commercially known among wholesale dealers in this country as "silk laces," at the time of the passage of the Act of June 30th., 1864, plaintiffs were entitled to recover.

6th. For the refusal of the Court to charge that it was immaterial whether goods like plaintiffs' importations were or were not known as laces, if they were not commercially known as "silk laces."

7th. For the refusal of the Court to charge that plaintiffs having shown without contradiction, that the articles in controversy were in fact composed of silk and cotton, the presumption in the absence of proof, would be that the laces were not "silk laces."

The plaintiffs' counsel specially assigns for error, for

an error that misled the jury and prevented them from finding a verdict for plaintiffs as they would have done :—

8th. *The charge of the Court that the Eighth Section of the Act of June 30, 1864, imposed a duty of 60 per cent. upon articles which were made of silk and cotton, in which silk was the controlling element, if they were known among merchants as* "SILK GOODS."

The Statute under which the duty was exacted, after enumerating "silk in the gum, spun silk, floss silk, sewing-silk, silk twist, dress and piece silks, ribbons, silk velvets, etc., proceeds as follows;—

"Silk vestings, pongees, shawls, scarfs, mantillas, pellerines, handkerchiefs, veils, *laces*, shirts, drawers, bonnets, hats, caps, turbans, chemisettes, hose, mitts, aprons, stockings, gloves, suspenders, watch-chains, webbings, braids, fringes, galloons, tassels, cords, and trimmings, and ready-made clothing of silk, or of which silk is a component material of chief value : sixty per centum ad valorem."

The next clause, under which the importer claims, is ;—

"Manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for, fifty per cent. *ad valorem*."

The undisputed facts before the jury were that the importation was *in fact* a manufacture of silk *and cotton*, and that silk was the component material of chief value. Plaintiffs' goods are therefore accurately described by the words of the last-named provision of the Statute, and were therefore dutiable at fifty per cent. unless they were "otherwise provided for."

POINTS.

First. The Court erred in refusing to charge the third request, to wit;

"That testimony having been given, and not contradicted, that the goods in suit were manufactures of silk and cotton in which silk was the component material of chief value, the plaintiffs were entitled to recover unless the goods were known in trade and commerce in this country, by importers as 'silk *laces.*'" Record, 8, fol. 25.

The Court did not charge this proposition or any equivalent of it.

It was not charging it to tell the jury that if plaintiffs' importation was not a silk lace *within the meaning of the Act*, plaintiffs were entitled to recover. That was another proposition. Beside how could the jury be expected to know the meaning of the Act?

It was not charging it fairly, to say that it was a silk lace, *within the meaning of the Act* if it was a lace of which silk was a component material of chief value. It was *not* telling the jury in any way, as requested, (and so that they could understand it) that plaintiffs were entitled to recover unless, &c. The Court refused the request, and the plaintiffs' counsel excepted.

It was not charging it, to say that if plaintiffs importation was commercially known as 'spot net' or 'dotted net' instead of lace (the undisputed testimony was that it was known as spot or dotted net) it would fall under the clause relating to manufactures of silk not otherwise provided for. The jury would not know what was meant by saying the goods *would fall under a clause of a statute.* The Court expressly refused this request not on the ground that the Court had already charged and assented to it, but the jury understood that the Court expressly dissented from it, because the Court considered the request incorrect. The

jury had good reason to believe that the Court considered the proposition bad law, because the Court afterward told the jury, on their return to Court for further instructions that the article imported was dutiable at sixty per cent., if they were known among merchants as "*silk* GOODS" (Record, top of p. 9)

The plaintiffs were in all fairness entitled to this charge that the matter might be left in no obscurity or doubt.

The plaintiffs had given evidence that goods like theirs were never bought or sold by the name of silk lace. (Rec., top of p. 7.) But that there was another class of goods which were bought and sold under the name of silk lace. (*Ib.*)

Defendants gave no evidence that such articles as plaintiffs' were bought or sold as silk lace. If the Court had given the request the jury would have been bound to render the verdict for plaintiff.

Second. The Court erred in refusing to charge plaintiffs' first request that, if the jury found that goods like plaintiffs' were not commercially known as silk lace, plaintiffs were entitled to recover (Rec., 8, fol. 24.)

Third. On the undisputed facts the plaintiffs were entitled to a verdict.

Grant that the witnesses all truly testified that plaintiffs' goods were of silk and cotton, silk being its material of chief value, then of course they were not in *reality* and *fact silk* lace, but laces partly of silk and partly cotton. Now unless they were called silk laces *commercially*, how can they be dutiable as "*silk laces.*"

But the Court refused to charge that plaintiffs were not entitled to recover if the goods were not commercially silk laces (p. 8, fol. 26).

Fourth. The Court erred in refusing to charge the fifth request, to wit:

"That it was immaterial whether goods like plaintiffs' were or were not known in trade, as *laces* if they were not commercially known as 'silk laces,'" (Rec. 8, 9; fols. 25, 26.)

The proposition was sound and relevant to the issue, and plaintiff was entitled to have it charged by the Court, and made clear to the jury who probably supposed that the defendants were entitled to recover if in in any sense the plaintiffs' article could be classed among laces whereas the duty was imposed only on "*silk* laces."

The lace was not in *fact* a silk lace, because it was composed of silk and cotton. If it was a silk lace at all it was only so in a commercial sense.

But all the witnesses testified that silk lace was not a commercial term; that is, that those words had no different meaning among importers than among the people at large.

Fifth. The Court erred in refusing to charge the sixth request, to wit;—

"That plaintiffs having shown without contradiction that the articles in controversy were composed of silk and cotton the presumption in the absence of proof would be that the laces were not silk laces." (Rec. 9; fol. 26.)

Now there was an utter absence of proof that this

silk and cotton lace was a silk lace commercially. All the witnesses agreed that silk lace was not a commercial term. (Rec. 7; fols. 20, 21.)

It is not easy to see why the Court should refuse to tell the jury that the presumption was that a silk and cotton lace was a silk and cotton lace and not a silk lace.

Sixth. The Court erred in charging the jury, who, not being able to agree, came into Court for more clear and definite instructions;—

"That the law imposed a duty of sixty per cent. upon articles which were made of silk and cotton in which silk was the controlling element if such articles were known among merchants as '*silk* GOODS'" (Rec. 9, fol. 26.)

Under this charge the jury were *compelled* to find a verdict for defendants because these goods were undisputably "made of silk and cotton, of which silk was the 'controlling element;' and they must have been known among all merchants as silk *goods*, plaintiffs claiming that they were known exclusively as *silk nets* and defendants claiming that they were known as *silk laces*, both parties agreed they were known to be SILK GOODS.

The case was one that presented distinctions, which should have been made clear by the Court. The record shows that the jury took different views of the case and, on all the instructions previously given, were unable to agree.

It must be noticed that the statutory clause upon which the government relies applies *only* to the *specified* "goods" enumerated, of which the sole or chief constituent in value is silk; to *silk* shawls, scarfs, mantillas, handkerchiefs, veils, laces, shirts, drawers, bonnets, hats, etc., etc.

To bring importations under *this* clause, *two* elements were essential; that the component material should be *silk*, and that they were such articles of that substance as were therein designated by specific names.

The article must not only be substantially of silk, but must also be a shawl, scarf, etc., etc.

It is not enough that the importation fulfills *one* of these conditions; that it owes its chief value to its silk. It must be *the designated article*, possessing that attribute: otherwise, it falls under the succeeding, *omnium* clause, under which we claim.

For instance, this Court has held that a veil *every fibre of which was silk* did not come under this sixty-per-cent. clause, because not *known* as a silk veil.

Arthur v. Morrison, 96 U. S., 108, 110, 111.
Smith v. Field, 105 U. S., 52.

Now, when the jury—entirely unable to agree under the instructions already given—return into Court for additional information, they are misled, their attention turned away from the foregoing correct proposition, by being told that their verdict should be against us if the "controlling element" (thus substituting an unknown term for the statutory phraseology) were silk, and the articles were known among merchants as "*silk* GOODS" (Rec. 9, fol. 26.)

"Silk goods" is NOT a *commercial designation*. It is a *descriptive phrase*.

This Court has frequently indicated this distinction.

Ex. gr., Greenleaf vs. Goodrich, 101 U. S., 284.
Solomon v. Arthur, 102 U. S., 212, top.

Reference to the cases cited in the Attorney-General's brief (kindly furnished us) and others that might be named shows that it is *only* the "commercial designation" (such as 'bohea,' 'crape veils,' 'thread

lace,' etc., etc.) that can be resorted to as a principle of construction.

Smith v. Field, 105 U. S., 52.

The jury were *not* told that (to legally exact 60 % upon our importations), fulfilling the other condition, they must be known among merchants as "silk *laces*"—which is a commercial designation—but as "silk *goods*,"—which is a descriptive phrase. This difference covers our whole case. Thus our perfectly just claim was ruined by an erroneous instruction, to which we, instantly, "specifically excepted." For this error, the adverse judgment should certainly be reversed, and a new trial awarded.

Perhaps it is hardly worth while to notice the criticism of our assignment of errors (filed Nov. 14, 1881) which accompanied the writ of error, but we will do so briefly.

The statutes, ever since the Judiciary Act, have required that "*an* assignment of errors" be returned with the writ, etc. R. S., Sec. 997.

The fourth clause of Rule XXI. (to which the Atty. Gen. refers) only says, "when there is *no* assignment of errors," as required by Sec. 997, "counsel will not be heard," etc. It does *not* say that *no other* errors can be assigned in the brief. See clause 2 of this rule. The practice has always been the contrary. (Phillips' Prac., 163, ch. xxii.) The fourth clause adds: "and errors not specified *according to this rule* [i. e., clause 2; *not* R. S., § 997] will be disregarded."

We have strictly complied with both statute and rule.

School Dist. v. Hall, 106 U. S., 428.

Our original assignment (Rec. 9) satisfied the stat-

ute, though not so full as that required by the *rule*. The assignment found in its proper place in this brief is in strict conformity with the *rule*.

The decisions touching the sufficiency of assignments of error have been as to those found in the brief of the plaintiff or appellant; whether these conformed to the rule.

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In the Supreme Court of the United States.

OCTOBER TERM, 1885.

THOMAS DREW ET AL., PLAINTIFFS in error,
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BRIEF FOR THE DEFENDANTS IN ERROR.

This was a suit by plaintiffs in error in the court below to recover the sum of $17.50 for duties on certain merchandise claimed by the plaintiffs to be an over-exaction of duty—the difference between 50 per cent. and 60 per cent. The case was regularly tried before a jury, under the instructions of the court, and a verdict rendered in favor of the defendants in error. The contest arises upon section 2504 (Schedule A, silks and silk goods), page 469, Revised Statutes, the collector contending that the goods were liable to a duty of 60 per cent. and the plaintiffs claiming that they were only liable to 50 per cent. duty.

Testimony was introduced on both sides to establish the character of the goods, and the court instructed the jury as follows (page 8, tr.):

> That if the plaintiffs' importation was not a silk lace within the meaning of the act of June 30, 1864, the plaintiff was entitled to recover.
>
> That it was a silk lace within the meaning of the act if it was a lace of which silk was the compound material of chief value, unless at the time the act was passed it was commercially known by importers and dealers in such articles in this country as a different article.
>
> That if it was commercially known as "spot net" or "dotted net" instead of lace, it would fall under the clause relating to manufactures of silk net, otherwise provided for; but if it was called by such name only to distinguish it from other varieties of silk lace, all silk laces being known by some particular name, which distinguished one variety from the others, it was nevertheless a silk lace within the meaning of the act.

It will be observed here by the court that there is no special exception reserved to these instructions. The plaintiffs then asked the court to give six propositions of law, all of which the court refused, and to this refusal the plaintiffs excepted (page 8 and 9 tr.). These six propositions only change, and give in different verbiage, the law that the court had already given; and it is a well-established principle that the court below, having given the law in its own language, this court will not reverse the case merely because it did not give the law in the language asked by the defeated party. (*Continental Insurance Company* vs. *Stead.*, 95 U. S., 161; *Indianapolis, &c.*,

Railroad Company vs. *Horst*, 93 U. S., 291; *Laber* vs. *Cooper*, 7 Wall., 565.)

The sixth proposition asked by the plaintiffs could not be given, because it was not a matter of presumption at all, but the whole question as to the character of the goods was to be submitted to the jury, and they were the proper judges of it. Not only were they the proper judges of this, but it has been repeatedly held in this court that their finding upon such a question of fact will not be interfered with here. (*Arthur* vs. *Cumming*, 91 U. S., 363; *Tyng* vs. *Grinnell*, 92 U. S., 470; *Arthur* vs. *Morrison*, 96 U. S., 111; *Arthur* vs. *Lahey*, Ib., 112; *Smith* vs. *Field*, 105 U. S., 52; *Smythe* vs. *Fiske*, 23 Wall., 374.) Indeed, the whole case is one of finding by the jury, and not reviewable here, after the court has given the law properly, as it did in this instance; and there is really nothing in the record upon which to found a substantial complaint by the plaintiffs. (See authorities last cited above.)

After the jury had retired they returned into court and asked for further instruction, which the judge gave as follows (page 9, tr.):

> That the first clause of the eighth section imposes a duty of 60 per cent. upon articles which were made all of silk, or which were made of silk and cotton in which silk was the controlling element, if they were known among merchants as silk goods.

To this charge the plaintiffs' counsel excepted. The charge of the court below in this respect has been so frequently sustained upon the circuit and in this court that it is unnecessary to discuss the proposition at any length;

because the question is one, as is universally admitted, to be determined by what may be called the *usus loquendi* among merchants. In other words, it is a designation fixed by commercial usage (*Two hundred chests of tea*, 9 Wheat., 430; *Elliott* vs. *Swartwout*, 10 Pet., 137; *Curtis* vs. *Martin*, 3 How., 106; *Maillard* vs. *Lawrence*, 16 How., 251; *United States* vs. *Breed*, 1 Sum., 159; *Morrison* vs. *Arthur*, 13 Blatch., 194; S. C., 96 U. S., 111; *Barber* vs. *Schell*, 107 U. S., 617), and the goods in question not falling within that clause of the act of June 30, 1864, which fixes 50 per cent. on articles "not otherwise provided for," the law given by the court, placing the goods under the previous part of section 2504, which fixes 60 per cent., was correct, for here the duty on that kind of goods is expressly "provided for" (*Solomon* v. *Arthur*, 102 U. S., 208).

One matter it is well to call the attention of the court to: the assignment of errors (page 9, tr.) is very meager, and really offers nothing for this court to consider, under section 997, Revised Statutes, and the fourth clause of the twenty-first rule of this court. It is very doubtful whether there is any case presented here for the court to pass upon, as there is no question raised as to the competency of the testimony; and, as already alluded to, there are no specific exceptions to the instructions of the court; and the whole subject, as before stated, was submitted to the jury upon the facts on both sides, a matter peculiarly within their province.

Respectfully,

A. H. GARLAND,
Attorney-General.